

## Judge Albright Enters Order Granting Summary Judgment Based on Lack of Written Description

AUGUST 3, 2020

On July 21, 2020, Judge Albright entered a detailed order explaining his reasoning for granting Intel's motion for summary judgment of invalidity based on lack of written description, which he had previously granted from the bench on June 5, 2020.

Intel filed its summary judgment motion along with its claim construction briefing, and it argued that there was not sufficient support from the specification for three terms. Judge Albright agreed, even noting that Intel had rebutted "every point raised by Flash-Control to support the presence of written description."

At the outset of his discussion, Judge Albright made two high-level holdings that are worth noting. First, Judge Albright held that the plaintiff Flash-Control's expert had improperly relied on the claims for written description support. Judge Albright stated that this was improper—noting that 35 U.S.C. § 112, ¶ 1 states that "[t]he *specification* shall contain a written description"—and Judge Albright disregarded the plaintiff's expert on this basis. Second, Judge Albright held that the plaintiff improperly "mixed-and-matched" citations to different embodiments rather than pointing to a single embodiment that supported all the limitations of the asserted claims, citing *Novozymes A/S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336, 1349 (Fed. Cir. 2013).

After providing these two high-level holdings, Judge Albright then spent five pages analyzing and dismissing Flash-Control's technical arguments in detail—ultimately granting Intel's motion for summary judgment. After ruling on the written description issue, Judge Albright also carefully considered Intel's separate indefiniteness argument and even readily recognized he had "some doubts" about the plaintiff's reasoning, but ultimately found that clear and convincing evidence of indefiniteness had not been shown.

### Takeaway:

Think it's impossible to win on summary judgment on a written description issue? Think again. But make sure you have a solid argument before filing a summary judgment on invalidity. As Judge Albright recognized by also denying the motion on indefiniteness—even with some doubts about the plaintiff's argument—clear and convincing evidence is still a tough burden.

If you are filing the motion as a defendant with a high burden, it was key here that Intel rebutted every argument the plaintiff made in opposition. As a plaintiff responding, make sure that your expert's analysis is consistent with the law, as the court has the ability to entirely disregard the expert if not. Whether you agree or disagree on the merits, though, you cannot complain that Judge Albright did not analyze the issue in detail—the Order included 25 pages of thorough analysis and dove directly into the technical details of a complex semiconductor technology.

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